(1)

Supreme Court, U.S.
FILED

No. 99-____ 992055 JUN 23 1999

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

*Petitioners,*

—v.—

COMMODITY FUTURES TRADING COMMISSION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

GARY D. STUMPP
*Counsel of Record*
ADAM M. BOND
STUMPP & BOND, LLP
45 Broadway, Suite 2106
New York, New York 10006
(212) 968-8600

53pp

## QUESTIONS PRESENTED

Whether, contrary to the holding of this Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), a single lower court decision in its favor confers upon the government immunity under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA").

Whether the government's jurisdictional position was not "substantially justified" under EAJA where this Court unanimously held on the merits that it was "quite unnatural," "in clear contravention of Congress' intent," "wholly unpersuasive," and "unsupported by statutory language" (and where the contrary conclusion was "clear" from the "plain language" of the statute).

Whether contrary to the holding of the Seventh Circuit, the Second Circuit properly may adjudicate an EAJA claim while wholly ignoring this Court's unanimous decision on the merits.

## PARTIES TO THE PROCEEDING

Petitioners are William C. Dunn ("Dunn") and Delta Consultants, Inc. ("Consultants"). Dunn is an individual; Consultants is a New Jersey corporation of which Dunn is the president.

Respondent is the Commodity Futures Trading Commission.

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that Delta Options, Ltd. and Nopkine Co., Ltd., which were named as defendants in the original action brought by the CFTC, were not parties to the proceeding in the court whose judgment is sought to be reviewed.

Pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court, petitioner Consultants states that it has no parent companies or subsidiaries.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISION INVOLVED | 2 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE PETITION | 5 |
| A. The Judgment of the Court of Appeals Below Conflicts With Two Separate Decisions of the Court | 6 |
| 1. The Decision Below Conflicts With Existing EAJA Precedent of the Court | 6 |
| 2. The Decision Below Ignores the Underlying Decision of the Court Before Remand | 9 |
| B. The Judgment of the Court of Appeals Below Resolves An Important Federal Question in a Way That Conflicts With the Seventh Circuit and Its Own Precedent | 12 |

PAGE

C. The CFTC Properly Should Be Liable Under EAJA For Its Contrived Jurisdictional Gambit ..... 15

CONCLUSION ..... 18

APPENDICES

Opinion of the United States Court of Appeals for the Second Circuit (March 26, 1999) ..... 1a

Order of the United States District Court for the Southern District of New York (March 20, 1998) ..... 6a

Opinion of the United States Supreme Court, Before Remand (February 25, 1997) ..... 12a

## TABLE OF AUTHORITIES

**Cases** PAGE

*Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582 (7th Cir. 1984) ..... 8

*Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) ..... 8

*Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) .....4, 7-9, 16, 18

*Commodity Futures Trading Comm'n v. Dunn*, D.N.J. Civ. Action No. 93-3740 (WGB)..... 17

*Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd.*, 99 F.3d 299 (9th Cir. 1996), *aff'g* [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,222 (N.D. Cal. 1994)..... 8, 17

*Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997).....*passim*

*Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994).....4, 13-15

*Pierce v. Underwood*, 487 U.S. 552 (1988).....4-8, 12

*Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994).....12-13

*Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994).....8, 16-17

*Secretary of HHS v. Zebley*, 493 U.S. 521 (1989) ..... 13

PAGE

**Statutes and Legislative History**

7 U.S.C. § 1 ..... 3

7 U.S.C. § 2(ii) ..... 3

7 U.S.C. § 6c(f) ..... 11

7 U.S.C. § 13a-1 ..... 17

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 2412 ..... 2

28 U.S.C. § 2412(d)(1)(A) ..... 2

131 Cong. Rec. (daily ed. July 25, 1985) ..... 7, 15

**Miscellaneous**

*Futures Industry*, March 1997 ..... 3

IN THE

# Supreme Court of the United States

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

*Petitioners*,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Dunn and Consultants petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, App. 1a-5a, is reported at 169 F.3d 785. The order of the district court, App. 6a-11a, is unreported. The opinion of this Court, before remand, App. 12a-28a, is reported at 519 U.S. 465.[1]

[1] Federal jurisdiction in the district court was based on the question of the application of a federal statute. 28 U.S.C. § 1331.

## JURISDICTION

The judgment of the court of appeals was entered on March 26, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 2412(d)(1)(A) of the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), provides in full as follows:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

## STATEMENT

EAJA provides that "a court shall award to a prevailing party" its attorney fees and other expenses incurred, "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). Here, it is undisputed that Petitioners were the "prevailing part[ies]"—due to this Court's prior unanimous decision in their favor. However, particularly in the specific circumstances presented, the Court's decision also should have demonstrated to the court below that the government did not meet its burden of proof that its position was "substantially justified."

### The Court's Prior Opinion, Before Remand

In the underlying action, the Commodity Futures Trading Commission ("CFTC") filed an enforcement action against Petitioners, who moved to dismiss on the basis that their *off*-exchange transactions in foreign currency options were excluded from the jurisdiction of the CFTC by the Treasury Amendment to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (the "CEA") (which exempts from CFTC jurisdiction all "transactions in foreign currency," unless they occur on an organized "board of trade" (or "exchange")). 7 U.S.C. § 2(ii). The district court denied that motion, and the court of appeals affirmed.

On February 25, 1997, the Court unanimously held that the opposite answer was "dictated" by the "plain meaning" of the Treasury Amendment—as Petitioners had consistently argued. The Court distinctly rejected the variety of CFTC contentions to the contrary, expressly stating, *inter alia*, that the CFTC's interpretation of the statute was "quite unnatural," "in clear contravention of Congress' intent," "wholly unpersuasive," and "unsupported by statutory language."[2] App. 18a-19a, 22a.

### The Application Under EAJA

Thereafter, Petitioners timely filed their application for attorney fees and expenses pursuant to EAJA. The district court denied Petitioners' application by Order dated March 20, 1998. App. 6a-11a. Petitioners appeal from a March 26, 1999 Order of the Court of Appeals for the Second Circuit, affirming the district court—which was *contrary* to existing

---

[2] Despite such a unanimous decision, the CFTC's Chairperson contended that "[t]here are other issues that are still open in the case and the case will go forward" (*Futures Industry*, March 1997, at 28)—thereby foreshadowing the CFTC's tactics on remand, when it persisted in its unwarranted attempts to continue the underlying litigation, by purporting to resurrect previously abandoned contentions. Ultimately, the Second Circuit rejected the CFTC's improper attempt to prolong this litigation, and directed that the district court dismiss the complaint.

EAJA precedent of the Court, and *ignored* all of the contents of the Court's prior opinion in the underlying action (and also was in conflict with the Seventh Circuit and its own precedent). App. 1a-5a.

Petitioners contended that, in the circumstances presented, the Court's analysis, language, and conclusions concerning the baselessness of the CFTC's position, belied any valid claim that it was "substantially justified." Additionally, such a decision should have bound the Second Circuit under both basic constitutional principles, as well as its own controlling EAJA determination in *Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994) ("*Political Contributions*"). However, the Second Circuit erroneously held, *solely* on the basis of a ten-year old decision by a prior panel in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) ("*American Board of Trade*")—the rationale of which was wholly rejected in the Court's underlying decision—that the CFTC had been "substantially justified."[3]

However, contrary to the overly simplistic approach adopted by the court below—which completely ignored this Court's decision in the underlying action on the merits—the Second Circuit also failed to follow the Court's separate EAJA admonition in *Pierce v. Underwood*, 487 U.S. 552, 569 (1988) ("*Pierce*") that "[o]bviously, the fact that one other court agreed or disagreed with the Government does *not*

---

[3] The Second Circuit correctly noted that when, as here, "a party has demonstrated that it is a prevailing party under the EAJA, the burden shifts to the government to demonstrate that its litigation position was 'substantially justified.' " App. 3a. However, in erroneously holding that the district court did not abuse its discretion in finding that the CFTC met its burden, the court below affirmed the finding based "on the fact that the Commission had relied on unambiguous Second Circuit precedent" (App. 3a-4a)—notwithstanding that the Court had unanimously rejected that decision's rationale as "quite unnatural."

establish whether its position was substantially justified," particularly since "the Government could take a position that is not substantially justified, yet win" (emphasis added)—as was the situation here, prior to the Court's decision in the underlying action.

## REASONS FOR GRANTING THE PETITION

Congress enacted EAJA to address "[c]oncern[s] that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation." (*Pierce*, *supra*, 487 U.S. at 575-76, Brennan, J., concurring) Here, rather than the mere fact of the CFTC's loss, it was the Court's rationale in rejecting each of its "unnatural" arguments which demonstrates that its position was not "substantially justified." Where, as here, the government's loss is due to agency contentions which the Court unanimously found not only "quite unnatural," but also "wholly unpersuasive," "unsupported by statutory language," and "in clear contravention of Congress' intent"—and the contrary conclusion (espoused by Petitioners from the outset) was "plain" from the clear statutory language (App. 18a-19a, 22a)—the lower courts reviewing Petitioners' EAJA application should have been bound by such a determination.

Instead, the decision below effectively creates EAJA immunity for the government—as long as it can find one case to support its position. Not only does such a determination contradict the Court's prior holding concerning "substantial justification," it also resurrects a sovereign immunity which EAJA was enacted to restrict, and creates an intolerable legal result. Thus, where there is a single prior decision in its favor—notwithstanding that its purported rationale is wholly defective or in conflict with decisions of other courts—the government can proceed with impunity, without fear of an EAJA award.

In addition to improperly encouraging the government to forum shop, such a holding also places potential litigants in the improper position of challenging unjustified government action at their own cost—simply because the government has a single precedent upon which to rely. Thus, it improperly violates both the purpose and the statutory language of EAJA, by actually deterring challenges to such unwarranted governmental action: no matter how unjustified the government's position was, the existence of a single prior decision in its favor in a circuit, precludes an EAJA award in that circuit.

Here, the CFTC initiated this action without any substantial justification, in an ultimately unsuccessful attempt to expand its regulatory jurisdiction beyond the appropriate parameters clearly set out by Congress in the Treasury Amendment. As demonstrated by the Court's decision, the CFTC engaged in an unjustified jurisdictional gambit—as a result of which Petitioners were forced to incur hundreds of thousands of dollars in fees and expenses. Since the claims raised (and relief requested) in its complaint evidently were only of secondary concern to the CFTC—and its actual motivation was to improperly expand its jurisdiction—an EAJA award is particularly appropriate.

## A. The Judgment of the Court of Appeals Below Conflicts With Two Separate Decisions of the Court

### 1. The Decision Below Conflicts With Existing EAJA Precedent of the Court

The decision below effectively conferred EAJA immunity on the CFTC, *solely* based on a single prior decision of that court—notwithstanding that its rationale was unanimously rejected by the Court. Such a decision constituted an abuse of discretion—since it was reached by *ignoring* the Court's underlying holding before remand, and *conflicts* with the Court's prior holding in *Pierce*.

There, in the Court's "first EAJA case," where it was "called upon to consider the phrase 'substantially justified' " (487 U.S. at 576, Brennan, J., concurring), it clearly held that "[o]bviously, the fact that one other court agreed or disagreed with the Government does *not* establish whether its position was substantially justified," particularly since "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569, emphasis added)—as was the situation here, prior to the Court's decision. However, notwithstanding this Court's holding in *Pierce*, the Second Circuit relied *solely* on its own prior decision in *American Board of Trade*—even though (and without even acknowledging that) its specific rationale was held by the Court to have been "quite unnatural." App. 18a.

Additionally, the court's holding permits the government to convert a position which was not substantially justified (although the government still won), into a position which is deemed to be substantially justified in later cases. In other words, notwithstanding the Court's acknowledgment in *Pierce* that "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569), that same position would necessarily be characterized as substantially justified under EAJA as to any later litigant. Thus, the decision below renders *Pierce*'s admonition meaningless, and gives the government no incentive to carefully consider its litigating position—which violates EAJA's intent to address this kind of unjustified governmental action, to "make Government bureaucrats think long and hard before they start an enforcement action," and to allow "prevailing private parties the chance to recover litigation expenses in actions against the Federal Government, where the Government cannot prove that its conduct is substantially justified." 131 Cong. Rec. 20,347, 20,348 (daily ed. July 25, 1985, statements of Senator Grassley on EAJA's reenactment).

Thus, not only did the decision below erroneously ignore all of the Court's holdings in its underlying decision before

remand, it also improperly rejected the Court's prior holding in *Pierce* that a decision in the government's favor in one prior case "obviously" is *not* sufficient to "establish whether its position was substantially justified." (487 U.S. at 569)[4] By blindly following its ruling in *American Board of Trade*—the rationale of which was unanimously rejected by the Court—the Second Circuit violated the Court's holdings in two separate opinions.

---

[4] Additionally, it failed to even consider *any* of the other decisions rendered concerning the appropriate scope of the Treasury Amendment, which had been contested in a number of cases, including appellate decisions by the Second, Fourth, Seventh, and Ninth Circuits—where only the Second Circuit in *American Board of Trade* and *Dunn* had held (erroneously) that the CFTC had jurisdiction over *off*-exchange options. Chronologically, these decisions are as follows: (1) *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), which held only that organized *exchange* trading in GNMA options was within CFTC rather than SEC jurisdiction, but expressly drew "no conclusion as to whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency" 677 F.2d at 1154 n.34; (2) *Abrams v. Oppenheimer Government Securities, Inc.*, 737 F.2d 582 (7th Cir. 1984), which held that the Treasury Amendment exempts *off*-exchange GNMA forward contracts from CFTC jurisdiction; (3) *American Board of Trade, supra*, which held that options did not become "transactions in foreign currency" until they were exercised, and thus the Treasury Amendment exemption did not cover options; (4) *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994), which held that *off*-exchange "transactions in foreign currency"—including options—were exempt from CFTC regulation by the Treasury Amendment; (5) *CFTC v. Dunn* (before the unanimous reversal by the Court) which had held it was bound by its prior decision in *American Board of Trade* (i.e. that options were not included in the Treasury Amendment exemption); and (6) *Commodity Futures Trading Comm'n v. Frankwell Bullion, Ltd.*, 99 F.3d 299 (9th Cir. 1996) ("*Frankwell*") (decided the week prior to oral argument before the Court in *Dunn*), which held that "Congress intended the Treasury Amendment to exempt all *off*-exchange transactions in foreign currency."

### 2. The Decision Below Ignores the Underlying Decision of the Court Before Remand

In its underlying decision, the Court reviewed the plain statutory language of the Treasury Amendment, its legislative history, and each of the arguments advanced by the CFTC. After its detailed analysis, the Court unanimously found that the issue (of whether "transactions in foreign currency" included "options") clearly was answered by simple and direct reference to the language of the Treasury Amendment. "We think it plain that foreign currency options are 'transactions in foreign currency' within the meaning of the statute," and "are not persuaded by any of the arguments advanced by the CFTC." App. 17a. Significantly, the Court was the only court to address the merits of Petitioners' contentions—as neither the district court nor the court below performed such an independent analysis, and instead held they were bound by the ten year old decision in *American Board of Trade*.

The decision below completely ignored that this Court's opinion essentially explained how its conclusion was the only appropriate result which could be reached, and rejected as legally unsound each of the CFTC's various contrary contentions—including the specific rationale relied on by the court below (both in its initial decision in the underlying case, as well as in its prior *American Board of Trade* decision), namely that options did not become "transactions in foreign currency" until they were exercised. As the Court held in its decision before remand:

> "[T]he Commission submits that the term 'transactions in foreign currency' includes only the 'actual exercise of an option (*i.e.*, the actual purchase or sale of foreign currency)' but not the purchase or sale of an option itself. Brief for CFTC 31. That reading of the text seems *quite unnatural* to us, and we decline to adopt it."

App. 18a (emphasis added)

Instead, as Petitioners had contended, the Court held that the purchase or sale of an off-exchange foreign currency option is itself a "transaction" (which provides the holder the right to purchase or sell foreign currency), and is a "transaction in foreign currency" because its subject matter is foreign currency.

> "The *more normal reading* of the key phrase encompasses all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading. . . . There *can be no question* that the purchase or sale of a foreign currency option is a transaction 'respecting' foreign currency. We think it *equally plain* as a matter of *ordinary meaning* that such an option is a transaction 'in' foreign currency for purposes of the Treasury Amendment."

*Id.* (emphasis added)

Moreover, the Court pointed out that the CFTC's contention that options were not covered by the Treasury Amendment exemption "violates the ordinary meaning of the key word" of the Treasury Amendment (App. 18a); "would deprive the exemption of the principal effect Congress intended" (*id.*), and would render the statutory exemption to be "mere surplusage" and "without any significant effect at all" (*id.*, 20a); utilizes reasoning that was "wholly unpersuasive" (*id.*, 19a); suggests a reading that was "in clear contravention of Congress' intent" (*id.*); raises arguments that "are unsupported by statutory language" (*id.*, 22a); and that the correct result was "contrary to the CFTC's view" (*id.*).[5]

---

[5] The Court also rejected the remaining contentions advanced by the CFTC in support of its desired interpretation of the Treasury Amendment, which included, *inter alia*, that: (1) CEA references to "transactions *in* foreign currency" allegedly did not include options, but those to "transactions *involving* foreign currency" did—due to the lack of any textual support, and since "[n]ot only do we think it unlikely that Congress would adopt such a subtle method of drawing important distinctions, there is little to suggest that it did so" (*id.*, 23a); (2) the so-called

Finally, the Court also noted that such a "plain meaning" result of including options within the Treasury Amendment exemption, was consistent with the express Congressional purpose indicated in its original enactment[6]—namely to

---

"savings clause" proviso in the Treasury Amendment (i.e., "unless such transactions involve the sale thereof for future delivery conducted on a board of trade") supported its interpretation—noting that it actually contradicted the CFTC's claim, and that "[t]he use of the term 'involving' instead, within the very amendment that the CFTC claims embraces this distinction, weighs heavily against the view that any such distinction was intended by Congress" (*id.*, 24a, footnote omitted); (3) the CEA had an alleged practice of regulating options more strictly than futures—since "we give only slight credence to these general historical considerations, which are unsupported by statutory language, or any evidence evocative of the particular concerns focused on by the legislators who enacted the Treasury Amendment" (*id.*, 22a); (4) that the 1982 amendments to the CEA (which had added 7 U.S.C. § 6c(f), excluding from the CEA "any transaction in an option on foreign currency traded on a national securities exchange"), implied that it would have jurisdiction over foreign currency that was *not* traded on a national exchange—since the amendment "merely resolved a conflict between the Securities Exchange Commission and the CFTC concerning their respective authority to regulate transactions on an exchange," "made no change in the law applicable to off-exchange trading," and "shed[s] no light on the intent of the authors of the Treasury Amendment that had been adopted eight years earlier" (*id.*, 26a, citations omitted); and (5) its belated claim for administrative deference (*id.*, 26a, n.14)—not only questioning whether "the CFTC's position would be the one owed deference," since "the Treasury Department has taken a quite different view of the statute—one consonant with the interpretation set forth here," but, more significantly, since the statute clearly includes "options within the Treasury Amendment's exemption, administrative deference is improper." (*Id.*)

[6] Indeed, the baselessness of the CFTC's position was underscored by Justice Scalia, who filed a separate three-sentence opinion concurring in the judgment, stating "that 'the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it,' . . . which includes options to buy or sell foreign currency," and also stating that "the Court's extensive discussion of legislative history . . . [was not] "necessary to confirm the 'plain meaning of the language,' " and thus "join[ed] all except those portions of the opinion, which achieve nothing useful and sow confusion in the law." (*Id.*, 28a, citations omitted)

address the specific concerns of the Treasury Department that proposed expansion of the CFTC's jurisdiction would interfere with the off-exchange foreign currency market. In finding the clearly consistent Congressional purpose, the Court rejected the CFTC's illogical suggestion that since the foreign currency options market was not developed at the time of the enactment of the Treasury Amendment in 1974, options should not be included in the exemption. "Contrary to the Commission's suggestion, we therefore think the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." (*Id.*, 22a)

Since the Court already has unanimously held that the CFTC was without jurisdiction over Petitioners (due to the "plain meaning" of the Treasury Amendment, and despite each of the CFTC's "unnatural" interpretations), the CFTC did not prove that its position was "substantially justified." The decision below improperly ignored the unanimous opinion of the Court (as well as all of its specific bases), and parochially relied solely on its own ten year old decision—the underlying rationale of which was wholly rejected by the Court. The decision below abused its discretion in concluding that the CFTC met its burden to prove that its position was "substantially justified"—particularly where not one Justice of the Court "was persuaded by any of [its] arguments," and the Court unanimously found its suggested reading of the Treasury Amendment to be "quite unnatural" and "in clear contravention of Congress' intent." *Id.*, 17a-19a.

### B. The Judgment of the Court of Appeals Below Resolves An Important Federal Question in a Way that Conflicts With the Seventh Circuit and Its Own Precedent

In addition to conflicting with the Court's holdings in both *Dunn* and *Pierce*, the decision below also conflicts with that of the Seventh Circuit in *Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994), and fails to follow its own EAJA precedent.

In *Marcus*, the Seventh Circuit held, in light of a recent opinion of the Court, that the government's position was not substantially justified, despite several lower court decisions in its favor. Specifically, while the *Marcus* appeal was pending, the Court decided the issue against the government in an unrelated action, *Secretary of HHS v. Zebley*, 493 U.S. 521 (1989). In *Zebley*, the Court held (in a 7-2 decision), and in language similar to that utilized in *Dunn*, that: the "regulations cannot be reconciled with the statute they purport to implement" (493 U.S. at 528), "are simply inconsistent with the statutory standard" (*id.* at 536), and "nullify [the] congressional choice" (*id.* at 537); the government's position was "not persuasive" and was "unconvincing" (*id.* at 539), and its arguments made "little sense" (*id.* at 541); and "the Secretary's approach" was "manifestly contrary to the statute." (*Id.*)

Relying on the Court's decision—and even in light of conflicting authority—*Marcus* held the government's position was *not* "substantially justified," since the Supreme Court had "refute[d] the Secretary's contention that the questions involved were close ones." (17 F.3d at 1038) Thus, the ruling below—which ignored this Court's underlying decision and denied fees based solely on its one decision in the government's favor—conflicts with the Seventh Circuit's proper EAJA analysis incorporating this Court's ruling on the merits, and following the admonition in *Pierce* not to base its decision solely on a single ruling for the government. Such contradictory approaches to analyzing claims under EAJA significantly hamper their appropriate resolution, and encourage parochial and conflicting determinations.

Furthermore, in addition to conflicting with the Seventh Circuit, the decision below also conflicts with its own EAJA precedent, as the panel should not have looked any further than its controlling decision in *Political Contributions*, *supra*. Instead, the decision below erroneously provided the CFTC with a "second chance" to have a Second Circuit panel

attempt to effectively overrule the Court's holding—particularly when it already held in *Political Contributions* that such a finding "allows no further consideration of this issue." (995 F.2d at 396)

There, before the EAJA application, a prior panel had conducted an exhaustive analysis of the statutory language and legislative history, and had ruled that "the Commission had adopted an unreasonably restrictive interpretation of the provision in question and of its own corresponding regulation" (*id.* at 384), which "had defied the congressional intent behind the Act" (*id.* at 385). Thus, the court noted that the prior panel had "considered this case on the merits [and] found the government's position to have been unreasonable," which "allows no further consideration of this issue." (*Id.* at 386)[7] There, as here, "[n]either the terms of the statute, its legislative history, nor the evidence concerning the nature of the [activities] involved were unknown to the Commission when it decided to undertake this litigation," and "the previous panel [had] conclusively established that the Commission's position was not substantially justified so as to bar an award of attorney's fees." (*Id.* at 387)

Under *Political Contributions*, where "a previous panel"—or certainly, as here, the Court—"has specifically passed on every question," and "found the Commission's position to have been unreasonable in that it frustrated the intent of Congress," both the district court and the Second Circuit are "bound by the panel's conclusions." (*Id.*) The determination

---

[7] The decision below erroneously attempted to avoid a conflict with its prior decision in *Political Contributions* by stating that there, the "only authority for the FEC's position was its own advisory opinion," but that here, the CFTC purportedly "reasonably relied on a controlling decision of this court to support its litigation position" and thus had "no difficulty in upholding the district court's determination that the Commission's position was 'substantially justified' " (App. 4a-5a)—although without acknowledging that the Court had unanimously rejected the entire rationale of that decision. *See* App. 18a.

here similarly should have been controlled by the Court's unanimous holding that the CFTC's interpretation was manifestly contrary to both the Treasury Amendment's plain language and the intent of Congress. Indeed, as the Second Circuit held in *Political Contributions*, it is "hard to imagine how it could be held that one had been 'substantially justified' in defying the will of Congress." (995 F.2d at 387)

"In granting summary judgment [or here—a unanimous reversal] to appellant, the previous panel [or here—this Court] found the Commission's position unreasonable in light of the plain language and legislative history of the statute." (*Id.* at 386) As there, the court below should have reversed the denial of EAJA fees "not because the government lost its claim, but because a previous panel of this court [or here, the Supreme Court] determined that the statutory language and the legislative history were clear."[8] (*Id.* at 387)

### C. The CFTC Properly Should Be Liable Under EAJA For Its Contrived Jurisdictional Gambit

Driven by a desire to exert jurisdiction beyond its statutorily mandated limits, the CFTC simply proceeded without substantial justification—apparently seeking to obtain unwarranted authority through Petitioners' anticipated attrition. As provided in EAJA's legislative history, however, rather than "capitulate in the face of [such] meritless action" (131 Cong. Rec., *supra*, at 20,348), Petitioners defended themselves

---

[8] Neither the CFTC nor the Second Circuit ever explained how it validly could be contended that something more than a unanimous decision of the Court before remand, as well as a prior decision of the Court (and governing precedent of the Second Circuit) should have been necessary below. Similarly, the CFTC failed to explain how it can claim to have relied on such Second Circuit precedent in the underlying action, but after its contentions are held to be "quite unnatural" by a unanimous Court, it then can claim that it is somehow (conveniently) *not* bound by such decision and the Second Circuit's precedent relating to an EAJA claim.

before the district court, the Second Circuit, and this Court—which unanimously rejected the CFTC's unjustified gambit.

In the underlying action, the CFTC consciously gambled that the Second Circuit would find itself bound by the ten-year old decision of a prior panel in *American Board of Trade*. However, the CFTC failed to analyze that reasoning (or the lack thereof) prior to bringing the underlying action—where its flawed conclusions should have been apparent. Indeed, the CFTC was fully aware that at the time this action was initiated, *American Board of Trade* was already 10 years old, and its reasoning had been seriously undermined by the Fourth Circuit in *Salomon Forex, supra*—which, unlike *American Board of Trade*, provided an extensive analysis of the language and meaning of the Treasury Amendment. (8 F.3d at 970-79) Nevertheless, the CFTC attempted to exploit *American Board of Trade* for its perceived tactical value (and continued to do so in reference to the subsequent EAJA application—where the Second Circuit then affirmed the district court's denial of Petitioners' application for EAJA fees, again *solely* based on the CFTC's alleged entitlement to "rely" on its rejected rationale in *American Board of Trade*). App. 4a-5a.

The CFTC's maneuver initially was successful—although the Second Circuit expressly noted that "[w]hatever doubts this panel may have about the interpretation" of *American Board of Trade* "are not grounds for our declining to follow it." (58 F.3d at 53) Moreover, its tactic ultimately would have been successful—if the Court had not granted review, and then expressly rejected all of its "unnatural" analyses. Particularly where the "reasoning" of *American Board of Trade* clearly represented a misreading of the plain meaning of the Treasury Amendment, and the CFTC exploited it for a "free ride" through the Second Circuit—both on the merits of the underlying action, as well as on the subsequent EAJA application—Petitioners properly should not be compelled to bear the cost of its unwarranted jurisdictional gambit.

Furthermore, this was not the CFTC's first attempt to reinterpret the Treasury Amendment and assert jurisdiction to suit its own purposes, despite the clear statutory language. The Fourth Circuit had recognized such attempts—noting that the CFTC was "pressing for greater regulation of transactions in foreign currencies." *Salomon Forex, supra*, 8 F.3d at 974. Similarly, in *Frankwell, supra*, the Ninth Circuit also rejected the CFTC's jurisdictional contentions, affirming the decision of the district court—which had rejected its "suggest[ed] interpretation of the Treasury Amendment" as inconsistent with the statutory language or legislative history, but "[n]ot surprisingly," it "would keep defendants within the reach of the Act." [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,222 at 41,984 (N.D. Cal. 1994).

Such a jurisdictional gambit also was evidenced by the CFTC's venue shopping tactics in these proceedings (which the decision below now encourages). Having filed its subpoena enforcement action in the district of New Jersey in August of 1993, *CFTC v. Dunn*, D.N.J. Civ. Action No. 93-3740 (WGB), the CFTC elected, seven months later, to commence its injunctive action in the Southern District of New York.[9] In doing so, the CFTC apparently sought: (1) to avoid litigating this matter before that court—which had modified its overly broad subpoenas, and imposed certain appropriate restrictions on its use of materials obtained;[10] and/or (2) to exploit (initially successfully) the Second Circuit's ten-year

---

[9] Under the CEA, venue was permissible either in the District of New Jersey (where Petitioners resided), or the Southern District of New York (where the banks were located which conducted the majority of the trading). 7 U.S.C. § 13a-1 provides that the CFTC may bring an action "in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur."

[10] That court did not rule on Petitioners' contention that the Treasury Amendment excluded CFTC jurisdiction over their activities. However, the CFTC was fully and formally aware of such a position, even prior to its initiation of this action.

old *American Board of Trade* ruling (rather than litigate in the Third Circuit, which had no Treasury Amendment decision).

Thus, after appeals to both the Second Circuit and the Court, Petitioners' original contention that the Treasury Amendment exempted their trading from CFTC jurisdiction was verified by a unanimous Court (which also unanimously rejected each of the CFTC's contrary contentions). In these circumstances, Petitioners are entitled to an award under EAJA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY D. STUMPP
*Counsel of Record*
ADAM M. BOND
STUMPP & BOND, LLP
45 Broadway, Suite 2106
New York, New York 10006
(212) 968-8600

June, 1999

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

August Term 1998

(Argued March 15, 1999 Decided March 26, 1999)

Docket No. 98-6117

---

COMMODITY FUTURES TRADING COMMISSION,

*Plaintiff-Appellee*,

—v.—

WILLIAM C. DUNN and DELTA CONSULTANTS, INC.,

*Defendants-Appellants*,

DELTA OPTIONS, LTD. and NOPKINE CO., LTD.,

*Defendants*.

---

Before:

WALKER and CABRANES, *Circuit Judges*,
and TSOUCALAS, *Judge**.

---

* The Honorable Nicholas Tsoucalas, of the United States Court of International Trade, sitting by designation.

Appeal from the judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*), denying defendants-appellants' application for an award of costs and attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §§ 2412, *et seq.*

Affirmed.

---

GARY D. STUMPP, Stumpp & Bond, LLP, New York, NY (Adam M. Bond, Stumpp & Bond, New York, NY, on the brief), *for Defendants-Appellants*.

MARIA GODEL, Commodity Futures Trading Commission, Washington, DC (Daniel R. Waldman, General Counsel, J. Douglas Richards, Deputy General Counsel, Commodity Futures Trading Commission, Washington, DC, on the brief), *for Appellee*.

---

*PER CURIAM*:

Defendants-appellants William C. Dunn and Delta Consultants, Inc. appeal from the March 24, 1998 order of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*). In the order denying their application for an award of costs and attorney's fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §§ 2412, *et seq.*, Judge Griesa concluded that the Commodity Futures Trading Commission ("CFTC" or "Commission") had a reasonable basis in law and fact for initiating litigation in this case, and thus was "substantially justified"

in doing so, thereby defeating the claim for a fee award under the EAJA. We affirm.

The history of the underlying CFTC enforcement action in this case has been set forth at considerable length in the opinions of this court and the Supreme Court, *see CFTC v. Dunn*, 58 F.3d 50 (2d Cir. 1995), *rev'd, Dunn v. CFTC*, 519 U.S. 465 (1997), as well as in the district court's opinion supporting the order from which this appeal is taken, *see CFTC v. Dunn*, No. 94 Civ. 2403, 1998 U.S. Dist. LEXIS 3722, at *1-6 (S.D.N.Y. Mar. 23, 1998). Familiarity with these opinions is assumed.

Under 28 U.S.C. § 2412(d)(1)(A),

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Once a party has demonstrated that it is a prevailing party under the EAJA, the burden shifts to the government to demonstrate that its litigation position was "substantially justified"—a term that the Supreme Court has defined as having a "reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58 (2d Cir. 1995); *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383, 386 (2d Cir. 1993). "The test is essentially one of reasonableness," *Political Contributions Data*, 995 F.2d at 386 (internal quotation marks omitted), and we will reverse a district court's determination on this issue only for an abuse of discretion, *see Sotelo-Aquije*, 62 F.3d at 57.

The sole issue presented by this appeal is whether the district court abused its discretion when it held that the CFTC had carried its burden of demonstrating that its litigation posi-

tion was substantially justified. The district court based its finding on the fact that the Commission had relied on unambiguous Second Circuit precedent to support its argument that a Treasury Amendment to the Commodity Exchange Act that provides an exemption from CFTC jurisdiction for, *inter alia*, "transactions in foreign currency," *see* 7 U.S.C. § 2(ii), did not remove the CFTC's jurisdiction over options to buy or sell currency traded off-exchange.

Appellants' principal contention on this appeal is that, while the CFTC acted in accordance with our decision in *CFTC v. American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986), which upheld CFTC jurisdiction, that position was not "substantially justified" because the Supreme Court later unanimously adopted a contrary view, *see Dunn*, 519 U.S. 465. Appellants cite our decision in *Political Contributions Data*, 995 F.2d 383, which permitted EAJA recovery after a litigation position of the Federal Election Commission ("FEC"), supported by an FEC advisory opinion, had been rejected by this court. We disagree.

The issue for EAJA purposes is not what the law is when the EAJA application is made, but rather whether the government was substantially justified in believing the law not to have foreclosed its position during the underlying litigation. *See Pierce*, 487 U.S. at 561. Because *American Board of Trade* was the binding law of this circuit on the jurisdictional question presented by this case during the filing and pendency of the CFTC's action against appellants, the CFTC was entitled to rely upon that authority, notwithstanding that the law changed thereafter.

Our decision permitting EAJA recovery in *Political Contributions Data* is not to the contrary. In that case, the FEC sought a declaratory judgment and injunctive relief for a violation of the Federal Election Campaign Act of 1974. The only authority for the FEC's position was its own advisory opinion. *See id.* at 384-85. Where, as here, the CFTC reasonably relied on a controlling decision of this court to support its litigation position, we have no difficulty in upholding

the district court's determination that the Commission's position was "substantially justified."

## CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

94 Civ. 2403 (TPG)

---

COMMODITY FUTURES TRADING COMMISSION,

*Plaintiff*,

—against—

WILLIAM C. DUNN, DELTA CONSULTANTS, INC., DELTA OPTIONS, LTD. and NOPKINE CO., LTD.,

*Defendants*.

---

## OPINION

Defendants seek an award of costs and attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §§ 2412, *et seq*. The application is denied.

### Facts

The history of this litigation has been stated at some length in opinions of the Second Circuit Court of Appeals and the Supreme Court. *CFTC v. Dunn*, 58 F.3d 50 (2d Cir. 1995), *rev'd*, *Dunn v. CFTC*, __ U.S. __, 117 S.Ct. 913 (1997).

Defendants carried on a business designed to exploit price differences in the international currency market by engaging

in options trading. Such options give the right, but not the obligation, to purchase or sell currency at some point in the future. Defendants traded these options in what is called the "off-exchange" market. "Off-exchange" trading is not conducted on an organized exchange or trading board, but rather "consists of myriad interlocking contracts struck over the telephone between dealers and through brokers." 58 F.3d at 51.

Defendants solicited investors to purchase options. Once investments were made, the investors were encouraged to maintain their investments by "rolling" them into new options contracts as the original options matured. Because defendants were for a time able to demonstrate large profits, many investors did so. These profits may or may not have been real, but at some point the operation became, in the words of the Court of Appeals, a "Ponzi scheme." 58 F.3d at 52. Once defendants began to lose money, investors who declined to "roll" their matured options contracts were "cashed out" with capital acquired from new investors, rather than with profits made from currency trading. *Id.* Eventually, this scheme unraveled, and by late 1993, defendants were informing their customers that they had sustained losses of nearly $100 million. *Id.*

In March 1994 the CFTC began to investigate Dunn's enterprises. This lawsuit followed in April of that year.

The CFTC is responsible for enforcing the Commodities Exchange Act ("CEA"), which regulates the sale of commodities for future delivery. *See* 7 USC §§ 2, *et seq*. The CFTC alleged that defendants violated 7 U.S.C. § 6c(b) and the CFTC regulations codified at 17 C.F.R. § 32.9. In essence, the law prohibits deception in connection with commodities option transactions. In the present case the CFTC alleged that fraudulent statements were made to investors in the Dunn operation. *See*, 58 F.3d at 52-53.

The CFTC sought, among other things, the appointment of a temporary equity receiver. Defendants' argued that the court lacked subject matter jurisdiction, including jurisdiction to

appoint a receiver, because the options traded were not within the CFTC's purview. That argument was based on an amendment to the CEA known as the Treasury Amendment. The Treasury Amendment provides:

> Nothing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2(ii) (1995). Since defendants conducted business "off exchange," they argued that the CFTC had no jurisdiction over their activities and could not bring an enforcement action in the district court.

The District Court rejected this argument stating, in a memorandum opinion dated July 1, 1994, that

> it is sufficiently satisfied on the subject of jurisdiction so that it believes that the appointment of a receiver is proper. The court relies upon *Commodities Futures Trading Commission v. The American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986).

The *American Board of Trade* case had analyzed the Treasury Amendment and held that the phrase "transactions in foreign currency" excluded options traded off-exchange.

Defendants appealed. The Court of Appeals unanimously affirmed the order appointing the receiver. *CFTC v. Dunn*, 58 F.3d 50. Judge Winter, joined by Judges Jacobs and Cabranes, noted that "defendants deceived investors and caused investors to receive false reports," and that such behavior was unlawful under the CEA, provided that the CFTC had jurisdiction over the defendants' trading activities. 58 F.3d at 52, 53. The Court of Appeals then addressed the Treasury Amendment and concluded that defendants' options trading did not constitute a "transaction in foreign currency" because the options were merely contracts giving the right to future performance, rather than binding purchases or sales of currency. Accordingly, it held that the Treasury Amendment was

inapplicable and that the District Court had properly exercised jurisdiction. The Court of Appeals relied upon its earlier decision in *American Board of Trade. CFTC v. Dunn*, 58 F.3d at 53. Although the Court of Appeals expressed some reservations about the earlier panel's decision, it held that *American Board of Trade* was "clear precedent" and was dispositive of the legal question at issue.

The Supreme Court reviewed the case and reversed unanimously. It held that the CFTC lacked jurisdiction over defendants' activities. The Court found that the option contracts at issue fell squarely within the phrase "transactions in foreign currency." The Court stated: "We think it is plain that foreign currency options are 'transactions in foreign currency' within the meaning of the [Treasury Amendment]." 117 S.Ct. at 915-916. The Court also stated that the CFTC's interpretation of the statute was "unnatural" and "could not be sustained." *Id.* at 916.

The Supreme Court remanded to the Second Circuit, which sought the views of the parties concerning the next steps to be taken. Defendants urged that the case be dismissed. The CFTC argued that a remand was needed to determine whether the defendants had traded on a "board of trade" (which would bring the transactions within the CFTC's jurisdiction). Upon due consideration, the court of appeals remanded the case to the district court with instructions to dismiss the complaint. The District Court complied on June 13, 1996.

On July 11, 1996 defendants filed this application for attorney's fees.

## Discussion

Defendants rely on 28 U.S.C. § 2412(d)(1)(A), which provides that

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding

> in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The decisive issue on the present motion is whether the CFTC's position was not "substantially justified." Substantially justified means "having a reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Sotelo-Aquije v. Slatterly*, 62 F.3d 54, 58 (2d Cir. 1995). The CFTC has the burden of showing substantial justification. *Sotelo-Aquije*, 62 F.2d at 57.

The court finds that the CFTC had a reasonable basis in law for instigating litigation. The decision of the Second Circuit in *American Board of Trade*, 803 F.2d 1242, squarely addressed the question of whether options in foreign currency were within the CFTC's jurisdiction, and concluded that they were. The CFTC was entitled to rely upon that decision in assessing whether to bring suit. Indeed it was obligated to follow that decision unless and until the decision was overruled. *Local 144, Hotel, Hosp., Nursing Home & Allied Svcs. Union v. NLRB*, 9 F.3d 218, 221 (2d Cir. 1993) ("an administrative agency . . . is bound to follow the law of the circuit"); *Reich v. Contractors Welding of W. New York, Inc.*, 996 F.2d 1409, 1413 (2d Cir. 1993); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980).

Moreover, the CFTC had a reasonable basis in fact for bringing suit. There is no suggestion that the CFTC failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention. *See*, *CFTC v. Dunn*, 58 F.3d at 52-53.

As for the Supreme Court's decision, it is enough to state that "the question is not what the law now is, but what the government was substantially justified in believing it to have been." *Pierce*, 487 U.S. at 561.

Defendants' application is denied.

SO ORDERED.

Dated: New York, New York
March 20, 1998

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

DUNN ET AL.

—v.—

COMMODITY FUTURES TRADING COMMISSION ET AL.

---

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

No. 95-1181

Argued November 13, 1996 Decided February 25, 1997

---

The Commodity Futures Trading Commission (CFTC) brought this action, claiming that petitioners solicited investments in and operated a fraudulent scheme involving transactions in foreign currency options in violation of the Commodity Exchange Act (CEA) and CFTC regulations. Petitioners allegedly engaged in the transactions by contracting directly with international banks and others, rather than using a regulated exchange or board of trade. This is known as trading in the "off-exchange" or "over-the-counter" market. Both petitioners and their customers suffered heavy losses. The District Court appointed a temporary receiver to take control of petitioners' property, rejecting their defense that the transactions were exempt from the CEA under the so-called "Treasury Amendment," which excepts "transactions in foreign currency" unless they involve a sale "for future delivery" "con-

ducted on a board of trade." The Court of Appeals affirmed.

*Held*: The Treasury Amendment exempts from CFTC regulation off-exchange trading in foreign currency options. Options (transactions in which the buyer purchases the right, but not the obligation, to buy or sell an agreed amount of a commodity at a set rate at any time prior to the option's expiration) like those at issue here are plainly "transactions in foreign currency" within the statute's meaning. The Court is not persuaded by any of the CFTC's arguments in support of a narrower reading that would exempt futures contracts (agreements to buy or sell a specified quantity of a commodity at a particular price for delivery at a set future date) without exempting options. The normal reading of the last-quoted phrase encompasses all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading. Reading the text to include only the actual purchase or sale of foreign currency, as the CFTC urges, violates the ordinary meaning of the key word "in." On the CFTC's reasoning, the exemption's application to futures contracts could not be sustained, in clear contravention of Congress' intent to exempt off-exchange foreign currency futures from CFTC regulation. This interpretation would also render the provision mere surplusage, and is not supported by the Treasury Amendment's legislative history. Given the history of evolving congressional regulation in this area, it is natural to read the exemption as a complete exclusion of foreign currency transactions from the regulatory scheme, except to the extent that the proviso for transactions "conducted on a board of trade" qualifies that exclusion. Contrary to the CFTC's position, there is little to suggest that elsewhere in the CEA Congress used the term transactions "involving" a particular commodity to describe options, and transactions "in" the commodity to indicate a narrower exclusion. The proviso "conducted on a board of trade"

does not aid the CFTC's cause because a broad reading of the proviso to include both options and futures is faithful to the contemporary legal context in which the amendment was drafted. The arguments favoring each side in the important public policy dispute over whether off-exchange foreign currency options should be exempt from CEA regulation are best addressed to the Congress, not the Courts. Pp. 468-480.

58 F. 3d 50, reversed and remanded.

---

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 480.

*Gary D. Stumpp* argued the cause for petitioners. With him on the briefs was *Adam M. Bond*.

*Jeffrey P. Minear* argued the cause for respondents. With him on the brief for respondent Commodity Futures Trading Commission were *Acting Solicitor General Dellinger, Deputy Solicitor General Kneedler, Pat G. Nicolette, Jay L. Witkin,* and *Gracemary Rizzo*.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether Congress has authorized the Commodity Futures Trading Commission (CFTC or Com-

---

* Briefs of *amici curiae* urging reversal were filed for Crédit Lyonnais et al. by *John M. Quitmeyer, Danforth Newcomb, Kent T. Stauffer,* and *David M. Lindley*; and for the Foreign Exchange Committee et al. by *Kenneth M. Raisler, Edward J. Rosen, Peter Buscemi,* and *Maris M. Rodgon.*

Briefs of *amici curiae* urging affirmance were filed for the Board of Trade of the City of Chicago by *Kenneth W. Starr, Mark D. Young,* and *Richard A. Cordray;* and for the Chicago Mercantile Exchange by *Jerrold E. Salzman* and *James T. Malysiak.*

mission) to regulate "off-exchange" trading in options to buy or sell foreign currency.

I

The CFTC brought this action in 1994, alleging that, beginning in 1992, petitioners solicited investments in and operated a fraudulent scheme in violation of the Commodity Exchange Act (CEA), 7 U.S.C. § 1 *et seq.*, and CFTC regulations.[1] App. 10. See 7 U.S.C. § 6c(b); 17 CFR § 32.9 (1996).[2] The CFTC's complaint, affidavits, and declarations submitted to the District Court indicate that customers were told their funds would be invested using complex strategies involving options to purchase or sell various foreign currencies. App. 8. Petitioners apparently did in fact engage in many such transactions. *Ibid.*; 58 F. 3d 50, 51 (CA2 1995). To do so, they contracted directly with international banks and others without making use of any regulated exchange or board of trade. In the parlance of the business, petitioners traded in the "off-exchange" or "over the-counter" (OTC) market.[3] *Ibid.* No options were ever sold

---

[1] The complaint names as defendants William C. Dunn, Delta Consultants, Inc., Delta Options, Ltd., and Nopkine Co., Ltd. App. 6-7. Only Dunn and Delta Consultants are petitioners here.

[2] The statute provides: "No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an 'option' . . . contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe." 7 U.S.C. § 6c(b). The regulations at issue here further make it unlawful "for any person directly or indirectly . . . [t]o cheat or defraud or attempt to cheat or defraud any other person; . . . [t]o make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof; . . . [or] [t]o deceive or attempt to deceive any other person by any means whatsoever . . . in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction." 17 CFR § 32.9 (1996).

[3] We are informed by *amici* that participants in the "highly evolved, sophisticated" OTC foreign currency markets include "com-

directly to petitioners' customers. However, their positions were tracked through internal accounts, and investors were provided weekly reports showing the putative status of their holdings. Petitioners and their customers suffered heavy losses. *Id.*, at 51-52. Subsequently, the CFTC commenced these proceedings.

Rejecting petitioners' defense that off-exchange transactions in foreign currency options are exempt from the CEA, the District Court appointed a temporary receiver to take control of their property for the benefit of their customers. App. to Pet. for Cert. 5b-6b. Relying on Circuit precedent,[4] and acknowledging a conflict with another Circuit,[5] the Court of Appeals affirmed. 58 F. 3d, at 54. We granted certiorari to resolve the conflict. 517 U.S. 1219 (1996). For the reasons that follow, we reverse and remand for further proceedings.

## II

The outcome of this case is dictated by the so-called "Treasury Amendment" to the CEA. 88 Stat. 1395, 7 U.S.C. § 2(ii). We have previously reviewed the history of the CEA and generally described how it authorizes the CFTC to regulate the "volatile and esoteric" market in futures contracts in fungible commodities. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356, 357-367 (1982). As a part of the 1974 amendments that created the CFTC and dramatically expanded

---

mercial and investment banks, . . . foreign exchange dealers and brokerage companies, corporations, money managers (including pension, mutual fund and commodity pool managers), commodity trading advisors, insurance companies, governments and central banks." Brief for Foreign Exchange Committee et al. as *Amici Curiae* 8. These markets serve a variety of functions, including providing ready access to foreign currency for international transactions, and allowing businesses to hedge against the risk of exchange rate movements. *Id.*, at 8-9.

[4] 58 F. 3d 50, 53 (CA2 1995) (citing *Commodity Futures Trading Comm'n* v. *American Bd. of Trade*, 803 F. 2d 1242 (CA2 1986)).

[5] 58 F. 3d, at 54 (citing *Salomon Forex, Inc.* v. *Tauber*, 8 F. 3d 966 (CA4 1993), cert. denied, 511 U.S. 1031 (1994)).

the coverage of the statute to include nonagricultural commodities "in which contracts for future delivery are presently or in the future dealt in," see 88 Stat. 1395, 7 U.S.C. § 2 (1970 ed., Supp. IV), Congress enacted the following exemption, which has come to be known as the "Treasury Amendment";

> "Nothing in this chapter shall be deemed to govern or in any way be applicable to *transactions in foreign currency*, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii) (emphasis added).

The narrow issue that we must decide is whether the italicized phrase ("transactions in foreign currency") includes transactions in options to buy or sell foreign currency. An option, as the term is understood in the trade, is a transaction in which the buyer purchases from the seller for consideration the right, but not the obligation, to buy or sell an agreed amount of a commodity at a set rate at any time prior to the option's expiration.[6] We think it plain that foreign currency options are "transactions in foreign currency" within the meaning of the statute. We are not persuaded by any of the arguments advanced by the CFTC in support of a narrower reading that would exempt futures contracts (agreements to buy or sell a specified quantity of a commodity at a particular price for delivery at a set future date)[7] without exempting options.

---

[6] See G. Munn & F. Garcia, Encyclopedia of Banking and Finance 736 (8th ed. 1983) (hereinafter Munn & Garcia); C. Luca,, Trading in the Global Currency Markets 243 (1995) (hereinafter Luca). Participants in these markets refer to an option that provides the right to sell currency as a "put," and one that provides the right to buy as a "call." Munn & Garcia 737; Luca 270, 272. Options can themselves be traded, at values that vary depending upon the exchange rate of the underlying currencies prior to the option's expiration. Brief for Foreign Exchange Committee et al. as *Amici Curiae* 5, n.5.

[7] See Munn & Garcia 414; City of New York Bar Association Committee on Futures Regulation, The Evolving Regulatory Framework for Foreign Currency Trading 9 (1986).

III

"[A]bsent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.' " *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995) (quoting *BFP* v. *Resolution Trust Corporation*, 511 U.S. 531, 570 (1994) (SOUTER, J., dissenting)). The CFTC argues, and the Court of Appeals held, that an option is not itself a transaction "in" foreign currency, but rather is just a contract right to engage in such a transaction at a future date. Brief for CFTC 30-31; 58 F. 3d, at 53. Hence, the Commission submits that the term "transactions in foreign currency" includes only the "actual exercise of an option (*i.e.*, the actual purchase or sale of foreign currency)" but not the purchase or sale of an option itself. Brief for CFTC 31. That reading of the text seems quite unnatural to us, and we decline to adopt it.

The more normal reading of the key phrase encompasses all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading. The CFTC's interpretation violates the ordinary meaning of the key word "in," which is usually thought to be "synonymous with [the] expressions 'in regard to,' 'respecting,' [and] 'with respect to.' " Black's Law Dictionary 758 (6th ed. 1990); see *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 697-698 (1995). There can be no question that the purchase or sale of a foreign currency option is a transaction "respecting" foreign currency. We think it equally plain as a matter of ordinary meaning that such an option is a transaction "in" foreign currency for purposes of the Treasury Amendment.

Indeed, adopting the Commission's reading would deprive the exemption of the principal effect Congress intended. The CFTC acknowledges that futures contracts fall squarely within the Treasury Amendment's exemption, Brief for CFTC 30, and there is no question that the exemption of off-exchange foreign currency futures from CFTC regulation was

one of Congress' primary goals.[8] Yet on the CFTC's reasoning the exemption's application to futures contracts could not be sustained.

A futures contract is no more a transaction "in" foreign currency as the Commission understands the term than an option. The Commission argues that because a futures contract creates a legal obligation to purchase or sell currency on a particular date, it is somehow more clearly a transaction "in" the underlying currencies than an option, which generates only the right to engage in a transaction. *Id.*, at 30-32. This reasoning is wholly unpersuasive. No currency changes hands at the time a futures contract is made. And, the existence of a futures contract does not guarantee that currency will actually be exchanged. Indeed, the Commission concedes that, in most cases, futures contracts are "extinguished before delivery by entry into an offsetting futures contract." *Id.*, at 30 (citing 1 T. Snider, Regulation of the Commodities Futures and Options Markets § 2.05 (2d ed. 1995) (hereinafter Snider)); see also Munn & Garcia 414. Adopting the CFTC's reading would therefore place both futures and options outside the exemption, in clear contravention of Congress' intent.

Furthermore, this interpretation would leave the Treasury Amendment's exemption for "transactions in foreign currency"

---

[8] The amendment was enacted on the suggestion of the Treasury Department at the time of a dramatic expansion in the scope of federal commodities regulation. The Department expressed concerns in a letter to the relevant congressional committee that this development might lead, *inter alia*, to the unintended regulation of the off-exchange market in foreign currency futures. See S. Rep. No. 93-1131, pp. 49-50 (1974) ("The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency") (letter of Donald Ritger, Acting General Counsel). The Treasury Amendment, which tracks almost verbatim the language proposed by the Department, cf. *id.*, at 51, was included in the legislation to respond to these concerns. *Id.*, at 23. The CFTC is therefore plainly correct to reject the suggestion of its *amici* that the Treasury Amendment's exemption be construed not to include futures contracts within its coverage. See Brief for Chicago Mercantile Exchange as *Amicus Curiae* 17-18; Brief for Board of Trade of City of Chicago as *Amicus Curiae* 10.

without any significant effect at all, because it would limit the scope of the exemption to "forward contracts" (agreements that anticipate the actual delivery of a commodity on a specified future date) and "spot transactions" (agreements for purchase and sale of commodities that anticipate near-term delivery).[9] Both are transactions "in" a commodity as the CFTC would have us understand the term. But neither type of transaction for *any* commodity was subject to intensive regulation under the CEA at the time of the Treasury Amendment's passage. See 7 U.S.C. § 2 (1970 ed., Supp. IV) ("term 'future delivery,' as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery"); Snider § 9.01; J. Markham, The History of Commodity Futures Trading and Its Regulation 201-203 (1987). Our reading of the exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage. See *Babbitt*, 515 U.S., at 698 (noting "reluctance to treat statutory terms as surplusage"); *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Finally, including options in the exemption is consistent with Congress' purpose in enacting the Treasury Amendment. Although at the time the Treasury Amendment was drafted a thriving off-exchange market in foreign currency futures was in place, the closely related options market at issue here had not yet developed. See City of New York Bar Association Committee on Futures Regulation, The Evolving Regulatory Framework for Foreign Currency Trading 18, 23 (1986). The CFTC therefore suggests that Congress could not have intended to exempt foreign currency options from the CEA's coverage. Brief for CFTC 41-42. The legislative history strongly suggests to the contrary that Congress' broad purpose in enacting the Treasury Amendment was to provide a general exemption from CFTC regulation for sophisticated off-exchange foreign currency trading, which had previously

---

[9] See Snider § 9.01 (defining "spot transactions" and "forward contracts").

developed entirely free from supervision under the commodities laws.

In explaining the Treasury Amendment, the Senate Committee Report notes in broad terms that the amendment "provides that inter-bank trading of foreign currencies and specified financial instruments is not subject to Commission regulation." S. Rep. No. 93-1131, p. 6 (1974).[10] Elsewhere, the Report again explains in general terms—without making reference to any distinction between options and futures—that the legislation

> "included an amendment to clarify that the provisions of the bill are not applicable to trading in foreign currencies and certain enumerated financial instruments unless such trading is conducted on a formally organized futures exchange. A great deal of the trading in foreign currency in the United States is carried out through an informal network of banks and tellers. The Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary." *Id.*, at 23.

Similarly, the Treasury Department submitted to the Chairman of the relevant Senate Committee a letter that was the original source of the Treasury Amendment. While focusing on the need to exempt the foreign currency futures market from CFTC regulation, the letter points out that the "participants in this market are sophisticated and informed institutions," and "the [CFTC] would clearly not have the expertise to regulate a complex banking function and would confuse an already highly regulated business sector." *Id.*, at 50 (letter of Donald Ritger, Acting General Counsel). The Department further explained that "new regulatory limitations and restrictions

---

[10] Similarly, the Conference Committee Report points out that the Treasury Amendment "provides that interbank trading of foreign currencies and specified financial instruments is not subject to Commission regulation." H. R. Conf. Rep. No. 93-1383, p. 35 (1974).

could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Ibid.*

Although the OTC market for foreign currency options had not yet developed in 1974, the reasons underlying the Treasury Department's express desire at that time to exempt off-exchange commodity futures trading from CFTC regulation apply with equal force to options today. Foreign currency options and futures are now traded in the same off-exchange markets, by the same entities, for quite similar purposes. See Brief for Foreign Exchange Committee et al. as *Amici Curiae* 19. Contrary to the Commission's suggestion, we therefore think the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it.

The CFTC rejoins that the Treasury Amendment should be construed in the light of Congress' history of regulating options more strictly than futures. See Snider §§ 7.03-7.04; Brief for CFTC 38-39. The Commission submits that this distinction was motivated by the view that options lend themselves more readily to fraudulent schemes than futures contracts. Hence, the CFTC argues that Congress would have acted reasonably and consistently with prior practice had it regulated commodities differently from options. While that may be true, we give only slight credence to these general historical considerations, which are unsupported by statutory language, or any evidence evocative of the particular concerns focused on by the legislators who enacted the Treasury Amendment. We think the history of the Treasury Amendment suggests—contrary to the CFTC's view—that it was intended to take all transactions relating to foreign currency not conducted on a board of trade outside of the CEA's ambit. This interpretation is consistent with the fact that, prior to the enactment of the CEA in 1974, foreign currency trading had been entirely unregulated under the commodities laws.

Our interpretation is also consonant with the history of evolving congressional regulation in this area. That history has been one of successively broadening the coverage of reg-

ulation by the addition of more and more commodities to the applicable legislation.[11] It seems quite natural in this context to read the Treasury Amendment's exemption of transactions in foreign currencies as a complete exclusion of that commodity from the regulatory scheme, except, of course, to the extent that the proviso for transactions "conducted on a board of trade" qualifies that exclusion. See 7 U.S.C. § 2(ii).

## IV

To buttress its reading of the statute, the CFTC argues that elsewhere in the CEA Congress referred to transactions "involving" a particular commodity to describe options or used other "more encompassing terminology," rather than what we are told is the narrower term transactions "in" the commodity, which was reserved for futures, spot transactions, and forward contracts. Brief for CFTC 30-33. Not only do we think it unlikely that Congress would adopt such a subtle method of drawing important distinctions, there is little to suggest that it did so.

Congress' use of these terms has been far from consistent. Most strikingly, the use of the word "involving" in the Treasury Amendment itself completely eviscerates the force of the

---

[11] The Grain Futures Act, enacted by Congress in 1922 to authorize the Secretary of Agriculture to supervise trading in grain futures on "contract markets," defined the regulated commodities to include "wheat, corn, oats, barley, rye, flax, and sorghum." 42 Stat. 998. In 1936 Congress expanded the coverage of the legislation to add further agricultural commodities, including cotton, rice, butter, eggs, and Irish potatoes. Ch. 545. 49 Stat. 1491. (The contrast between the title of the 1936 Act—"Commodity Exchange Act"—and the title of its predecessor—"Grain Futures Act"—suggests that an easy way to describe the coverage of the legislation is to identify the commodities that it regulates.) In 1968 the coverage of the legislation was again expanded, this time to include livestock and livestock products. 82 Stat. 26. The 1974 amendment expanded the coverage of the statute to include nonagricultural commodities and, appropriately, replaced regulation by the Secretary of Agriculture with regulation by a new commission whose title included the word "Commodity."

Commission's argument. After setting forth exemptions for, *inter alia*, "transactions in foreign currency," the amendment contains a proviso sweeping back into the statute's coverage "such transactions *involv[ing]* the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii) (emphasis added). As we have already noted, the CFTC agrees that futures contracts are a subset of "transactions in foreign currency." The Commission further submits that the proviso uses the word "involve" to make the exemption inapplicable to those futures contracts that are conducted on a board of trade. This contradicts the "in" versus "involving" distinction. We would expect on the Commission's reasoning that this provision would refer to "transactions *in* futures." The use of the term "involving" instead, within the very amendment that the CFTC claims embraces this distinction, weighs heavily against the view that any such distinction was intended by Congress.[12]

---

[12] Similarly, the statute refers at one point to "[t]ransactions *in* commodities *involving* the sale thereof for future delivery . . . and known as 'futures.' " 7 U.S.C. § 5 (emphasis added). Had Congress meant to maintain the Commission's distinction, we would not have expected the Legislature to use the words "in" and "involving" loosely in the same sentence to refer to futures, which the CFTC informs us are transactions "in" (but not "involving") foreign currency. Similarly, the statute refers elsewhere to "transaction[s] *in an option* on foreign currency." § 6c(f) (emphasis added). If Congress had spoken in the manner the CFTC suggests, that provision would instead use the phrase "transactions *involving* an option."

The statute's general jurisdictional provision also fails to maintain the distinction the Commission presses. The CEA provides that the CFTC "shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . .), and transactions *involving* contracts of sale of a commodity for future delivery." § 2(i) (emphasis added). The Commission submits that this language gives the CFTC regulatory authority over options on futures contracts, see Snider § 10.11, and argues that the use of the word "involving" is therefore in keeping with its interpretation of the statutory scheme. See Brief for CFTC 32. But § 2(i) provides the CFTC with exclusive jurisdiction over far more. Among other things, it explicitly grants jurisdiction over any "transactio[n] *involving* contracts of sale of a commodity for future delivery," plainly meaning at a minimum ordinary futures contracts, which the Commission otherwise insists are transactions "in" commodities.

The CFTC argues further that the proviso properly understood aids its cause. The proviso sweeps back into the CFTC's jurisdiction otherwise exempt "transactions in foreign currency" that "involve the sale thereof for future delivery" and are "conducted on a board of trade." Since the proviso refers to futures without mentioning options, the Commission submits that the exemption itself should be read only to cover futures because Congress cannot reasonably have intended to regulate exchange trading in foreign currency futures without also regulating exchange trading in such options. We agree that Congress intended no such anomaly. But we are satisfied that the anomaly is best avoided by reading the proviso broadly rather than reading the exemption narrowly.

The proviso's language fairly accommodates inclusion of both options and futures. To fall within the proviso, a transaction must "*involve* the sale [of foreign currency] for future delivery." § 2(ii) (emphasis added). Because options convey the right to buy or sell foreign currency at some future time prior to their expiration, they are transactions "involv[ing]" or related to the sale of foreign currency for future delivery. Thus, both futures and options are covered by both the exemption and the proviso. While that may not be the only possible reading of the literal text, and we do not intend to suggest that a similar construction would be required with respect to other provisions of the CEA, our interpretation is faithful to the "contemporary legal context" in which the Treasury Amendment was drafted. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979); see also *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (noting that " 'in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy' ") (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)).

Finally, the CFTC calls our attention to statements in the legislative history of a 1982 amendment to the CEA.[13] indi-

---

[13] Futures Trading Act of 1982, Tit. I, § 102, 96 Stat. 2296, 7 U.S.C. § 6c(f).

cating that the drafters of that amendment believed that the CFTC had the authority to regulate foreign currency options "when they are traded other than on a national securities exchange." See S. Rep. No. 97-384, p. 22 (1982). Those statements, at best, might be described as "legislative dicta" because the 1982 amendment itself merely resolved a conflict between the Securities Exchange Commission and the CFTC concerning their respective authority to regulate transactions on an exchange. See Snider § 10.24. The amendment made no change in the law applicable to off-exchange trading. Although these "dicta" are consistent with the position that the CFTC advocates, they shed no light on the intent of the authors of the Treasury Amendment that had been adopted eight years earlier. See, *e.g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 839-840 (1988).[14]

---

[14] Though the CFTC's brief disclaims any need for it, Brief for Respondent 48, at oral argument the Commission requested for the first time that we give deference to its interpretation of the Treasury Amendment as the agency "charged with administering" it. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996); Tr. of Oral Arg. 54; see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If *Chevron* principles were applicable, we are unsure that the CFTC's position would be the one owed deference. As the Commission concedes, Brief for CFTC 25, the Treasury Department has taken a quite different view of the statute—one consonant with the interpretation set forth here—to which petitioners argue deference is owed if *Chevron* is invoked. A reasonable argument could be made that Congress intended to charge Treasury, rather than the Commission, with administering the dimensions of the aptly named Treasury Amendment, which was specifically enacted at the behest of Treasury to confine the CFTC's activities. Cf. *Smiley*, 517 U.S., at 740-741 (explaining that *Chevron* deference arises out of background presumptions of congressional intent); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157-158 (1991) (allocating power "authoritatively to interpret . . . regulations" after assessing "available indicia of legislative intent"). We need not "resolve the difficult issues regarding deference which would be lurking in other circumstances." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Because "the statute, as a whole, clearly expresses Congress' intention" to include foreign currency options within the Treasury Amendment's exemption, administrative deference is improper. *Dole* v. *Steelworkers*, 494 U.S. 26, 42 (1990).

V

Underlying the statutory construction question before us, we recognize that there is an important public policy dispute—with substantial arguments favoring each side. Petitioners, their *amici*, and the Treasury Department argue that if off-exchange foreign currency options are not treated as exempt from CEA regulation, the increased costs associated with unnecessary regulation of the highly sophisticated OTC foreign currency markets might well drive this business out of the United States.[15] The Commission responds that to the extent limited exemptions from regulation are necessary, it will provide them, but argues that options are particularly susceptible to fraud and abuse if not carefully policed. Brief for CFTC 26, 49. As the Commission properly acknowledges, however, these are arguments best addressed to the Congress, not the courts. See *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979). Lacking the expertise or authority to assess these important competing claims, we note only that "a literal construction of a statute" does not "yiel[d] results so manifestly unreasonable that they could not fairly be attributed to congressional design." *Ibid.*

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

---

[15] Brief for Petitioners 23-25; Brief for Credit Lyonnais et al. as *Amici Curiae* 3; Brief for Foreign Exchange Committee et al. as *Amici Curiae* 6; Brief for CFTC 25.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I agree with the Court that "the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it," *ante*, at 474, which includes options to buy or sell foreign currency. This principle is contradicted, however, by the Court's extensive discussion of legislative history, see *ante*, at 471, n.8, 473-474, 478-479, as though that were necessary to confirm the "plain meaning of the language," or (worse) might have power to overcome it. I join all except those portions of the opinion, which achieve nothing useful and sow confusion in the law.

Supreme Court, U.S.
FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 98-2055

# In the Supreme Court of the United States

WILLIAM C. DUNN AND DELTA CONSULTANTS, INC.,
PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

DAVID R. MERRILL
*Acting General Counsel*
J. DOUGLAS RICHARDS
*Deputy General Counsel*
C. MARIA D. GODEL
*Attorney*
*Commodity Futures Trading Commission*
*Washington, D.C. 20581*

## QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners an award of attorneys fees on the ground that the Commodity Futures Trading Commission was "substantially justified" in asserting jurisdiction over petitioners' dealings in options on foreign currencies, even though this Court later rejected the statutory construction (and controlling circuit precedent) on which the Commission relied.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 6 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Board of Trade* v. *SEC*, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982) | 3, 7, 8 |
| *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986) | 2, 3, 7 |
| *CFTC* v. *Dunn*, 58 F.3d 50 (2d Cir. 1995), rev'd, 519 U.S. 465 (1997) | 3, 9 |
| *CFTC* v. *Sterling Capital Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169 (N.D. Ga. Feb. 20, 1981), modified, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981) | 3, 7-8 |
| *FEC* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), cert. denied, 510 U.S. 1116 1116 (1994) | 10 |
| *Marcus* v. *Shalala*, 17 F.3d 1033 (7th Cir. 1994) | 10 |
| *Pierce* v. *Underwood*, 487 U.S. 552 (1988) | 6, 7, 8, 9 |
| *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966 (4th Cir. 1993), cert. denied, 511 U.S. 1031 (1994) | 2 |
| *Wisniewski* v. *United States*, 353 U.S. 901 (1957) | 10 |


Statutes:


| | |
|---|---|
| Commodity Exchange Act, 7 U.S.C. 1 *et seq.* | 2 |
| § 2(a)(1)(A)(i), 7 U.S.C. 2(i) | 2 |
| § 2(a)(1)(A)(ii), 7 U.S.C. 2(ii) | 2 |
| § 4c(b), 7 U.S.C. 6c(b) | 2 |

Statutes—Continued: Page

Equal Access to Justice Act, 28 U.S.C. 2412 ..... 4
28 U.S.C. 1292(a)(2) ..... 3

Miscellaneous:

Letter from CFTC Regional Counsel to Hon. Thomas Griesa (May 24, 1994) ..... 3

# In the Supreme Court of the United States

No. 98-2055

WILLIAM C. DUNN AND DELTA CONSULTANTS, INC., PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 169 F.3d 785. The order of the district court (Pet. App. 6a-11a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1999. The petition for a writ of certiorari was filed on June 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In April 1994, the Commodity Futures Trading Commission (CFTC) brought suit against petitioners and other defendants in the United States District Court for the Southern District of New York. See Pet. App. 7a. The suit charged that petitioners had com-

mitted fraud in connection with commodity option contracts, in violation of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and associated regulations. Pet. App. 7a. Among other things, the Commission sought the appointment of a temporary receiver to locate, preserve, and control petitioners' property for the benefit of their customers. See *id.* at 7a, 16a.

Petitioners sought dismissal of the Commission's complaint on the ground that the Commission lacked any jurisdiction over the contracts in which they dealt, which were options on foreign currency. Pet. App. 7a-8a. They relied on the so-called "Treasury Amendment" to the CEA, 7 U.S.C. 2(ii), which provides:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

In *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966, 976 (1993), cert. denied, 511 U.S. 1031 (1994) (*Tauber*), the Fourth Circuit had held that the Treasury Amendment "applie[d] to *all* transactions in which foreign currencies [were] the subject matter, including options."

In asserting jurisdiction over petitioners' conduct, the Commission relied on Sections 2(a)(1)(A)(i) and 4c(b) of the CEA, 7 U.S.C. 2(i) and 6c(b), which give the Commission jurisdiction over trading in options, and on the Second Circuit's decision in *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (1986) (*ABT*). See Pet. App. 8a-9a, 15a-16a. *ABT* had held that the Treasury Amendment did not deprive the Commission of

jurisdiction over options on foreign currency, because a contract giving the holder the option to purchase or sell a foreign currency by a specified date at a specified price did not become a "transaction[ ] in" that currency, within the meaning of the Amendment, unless and until the option was exercised. See *id.* at 8a-9a; 803 F.2d at 1248. The Commission also cited *Board of Trade* v. *SEC*, 677 F.2d 1137, 1154 (7th Cir.) (options on Government National Mortgage Association securities not "transactions in * * * government securities" for Treasury Amendment purposes because "[o]nly when the option holder exercises the option is there a transaction in a government security"), vacated as moot, 459 U.S. 1026 (1982), and *CFTC* v. *Sterling Capital Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169, at 24,784 (N.D. Ga. Feb. 20, 1981) (*Sterling Capital*) (foreign currency options not "transactions in" foreign currency until exercised), modified on other grounds, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981). See 94-6197 C.A. App. A130-A134 (2d Cir.) (Letter from CFTC Regional Counsel to Hon. Thomas Griesa (May 24, 1994)).

The district court granted the Commission's motion for a temporary receiver, basing its jurisdictional determination on the Second Circuit's decision in *ABT*. See Pet. App. 8a, 16a. On petitioners' interlocutory appeal under 28 U.S.C. 1292(a)(2), the Second Circuit concluded that the Commission's evidentiary proffer "sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports," conduct that would violate the CEA if the Commission had jurisdiction over petitioners' trading in currency options. *CFTC* v. *Dunn*, 58 F.3d 50, 53 (1995), rev'd on other grounds, 519 U.S. 465 (1997). The court rejected

petitioners' argument that the Commission had no such jurisdiction, relying on *ABT*'s interpretation of the Treasury Amendment: "This issue is foreclosed by clear precedent in this circuit that holds that the term 'transactions in foreign currency' does not include options, even those options traded off-exchange." *Ibid.* The court acknowledged that its holding conflicted with the Fourth Circuit's decision in *Tauber*, but it viewed that conflict as one "for the Supreme Court * * * to resolve." *Id.* at 54; see Pet. App. 16a & n.5.

This Court granted review, and reversed the Second Circuit's judgment. Pet. App. 12a-28a. Finding the relevant statutory language "plain," the Court held that the Treasury Amendment's term "transactions in foreign currency" includes transactions involving options to buy or sell foreign currency, as well as those involving foreign currency futures contracts (*i.e.*, "agreements to buy or sell a specified quantity of [foreign currency] at a particular price for delivery at a set future date"). *Id.* at 17a. On remand from this Court, the court of appeals in turn remanded the case to the district court, with instructions to dismiss the complaint. See *id.* at 9a.

2. In July 1996, petitioners filed an application with the district court seeking attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pet. App. 6a, 9a. The district court denied the application. *Id.* at 6a-11a. The court reasoned that the Commission "had a reasonable basis in law for instigating litigation," because the Second Circuit's decision in *ABT* had "squarely addressed" the jurisdictional issue, and the Commission "was entitled to rely upon that decision in assessing whether to bring suit. Indeed it was obligated to follow that decision unless and until the decision was overruled." *Id.* at 10a.

The court further noted that the Commission had a "reasonable basis in fact for bringing suit," there being "no suggestion that [the Commission] failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." *Ibid.* Accordingly, the court held that the Commission's decision to bring suit against petitioners was "substantially justified" within the meaning of the EAJA, and that petitioners were therefore not entitled to an award of fees or costs under that Act. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-5a. The court first noted that the test of "substantial[ ] justifi[cation]" under the Act "is essentially one of reasonableness," and that the district court's resolution of the issue would be reversed only if that court had abused its discretion. *Id.* at 3a. The court then rejected (*id.* at 3a-5a) petitioners' argument that because this Court had unanimously rejected the holding and reasoning of the *ABT* opinion, on which the Commission had relied in bringing suit, the Commission could not have been "substantially justified" in asserting jurisdiction over petitioner's conduct in the first place. Observing that "[t]he issue for EAJA purposes is not what the law is when the EAJA application is made, but rather whether the government was substantially justified in believing the law not to have foreclosed its position during the underlying litigation," the court of appeals agreed with the district court that because *ABT* "was the binding law of this circuit on the jurisdictional question presented by this case during the filing and pendency of the CFTC's action against [petitioners], the CFTC was entitled to rely upon that authority, notwithstanding that the law changed thereafter." *Id.* at 4a.

## ARGUMENT

1. The court of appeals held (Pet. App. 1a-5a) that the district court did not abuse its discretion when it determined (*id.* at 6a-11a) that the CFTC was "substantially justified" in attempting to assert jurisdiction over petitioners' fraudulent dealings in foreign currency options. Both courts relied principally (*id.* at 4a, 10a) on the fact that at the time the Commission brought suit against petitioners, the court of appeals had already resolved the relevant jurisdictional question in the Commission's favor, and this Court had not yet held to the contrary (see *id.* at 12a-27a). Petitioners argue (Pet. 6-8) that the decision below conflicts with *Pierce* v. *Underwood*, 487 U.S. 552, 569 (1988). That argument lacks merit.

*Pierce* addressed two important issues under the EAJA: the meaning of the "substantially justified" standard, and how appellate courts should review district court decisions applying that standard. See 487 U.S. at 557-568. On the first point, the Court held that a legal position is "substantially justified" so long as it has a "reasonable basis both in law and fact." *Id.* at 565; see also *id.* at 566 n.2. As to the second, the Court made clear that a district court's determination to award or not to award fees is properly subject only to "deferential review" under an "abuse of discretion" standard. *Id.* at 559, 563; see *id.* at 557-563. Nothing in the decision below conflicts with either of those holdings.

As petitioners point out (Pet. 7), in *Pierce* the Court observed (in passing) that "the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified." 487 U.S. at 569. In relying on that observation here, however, petitioners ignore both the context in

which the Court made it and the circumstances of the present case.

In *Pierce*, the Court noted that both the government and the respondents cited various lower court decisions in support of their respective positions. 487 U.S. at 569. The Court held, however, only that the existing authority as a whole showed sufficient support for the respondents' position to make it impossible to conclude, "on the basis of these objective indications alone, that the District Court abused its discretion in finding no substantial justification" for the government's position. *Ibid.*

In this case, the district court concluded that the CFTC's jurisdictional position *was* substantially justified, relying primarily on the existence of the Second Circuit's decision in *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (1986), which was dispositive precedent in that Circuit at the time the Commission brought suit. Pet. App. 10a.[1] *ABT* was not only binding as a matter of authority in the jurisdiction where the Commission brought its case; it was also a reasoned decision by a unanimous panel of the Second Circuit—a court with considerable expertise in matters relating to commercial and financial regulation. Moreover, it relied on reasoning that had also been endorsed by two other courts, including the Seventh Circuit. See *ABT*, 803 F.2d at 1248, citing *Board of Trade* v. *SEC*, 677 F.2d 1137, 1154 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982), and *CFTC* v. *Sterling Capital Co.*, [1980-

[1] The court also determined that the Commission's position had a "reasonable basis in fact," noting that there was "no suggestion that the CFTC failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." Pet. App. 10a.

1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169, at 24,783-24,784 (N.D. Ga. Feb. 20, 1981), modified on other grounds, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981).[2] Those circumstances are plainly sufficient, under *Pierce*, to support the court of appeals' holding that the district court did not abuse its discretion by finding that the government was substantially justified in making in this case precisely the same jurisdictional argument that had previously been accepted in *ABT*.

2. Petitioners argue further (Pet. 9-12) that the decision below with respect to attorneys fees conflicts with this Court's earlier decision on the merits in this case. As *Pierce* made clear, however, "a position can be justified even though it is not correct"; and for EAJA purposes a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." 487 U.S. at 566 n.2. Moreover, however clear a point of law may appear after this Court has resolved it, the question before a district court considering an EAJA application is "not what the law now is, but what the Government was substantially justified in believing it to have been." *Id.* at 561. The question on appeal from the district court's denial of an EAJA award is even narrower: Whether that court abused its discretion in concluding that, at the time the government acted, a reasonable person could have thought that its position was correct. See *id.* at 557-563.

---

[2] In *Board of Trade* v. *SEC*, the court held that trading in options to buy or sell government securities did not involve "transactions in * * * government securities" for purposes of the Treasury Amendment, because "[o]nly when the option holder exercises the option is there a transaction in a government security." 677 F.2d at 1154. *Sterling Capital*, like *ABT*, applied the same reasoning to foreign currency options.

The courts below understood and applied those standards in this case. See Pet. App. 3a-4a, 10a. As the district court recognized (*id.* at 10a), in asserting jurisdiction over petitioners the CFTC relied on arguments that had already been accepted by the Second Circuit, as well as by other courts. Although this Court ultimately found those arguments unpersuasive (see *id.* at 17a), they were not unreasonable—particularly in light of the important public purposes that the Commission sought to further by pursuing remedies for the fraudulent conduct in which petitioners had engaged. See *id.* at 27a (acknowledging importance of Commission's claim that "options are particularly susceptible to fraud and abuse if not carefully policed"); *id.* at 10a (noting existence of factual basis for Commission's action); *CFTC* v. *Dunn*, 58 F.3d 50, 51-53 (2d Cir. 1995) (describing evidence and noting that "[t]he CFTC's evidentiary proffer sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports," causing investors tens of millions of dollars in damage through "an old-fashioned 'Ponzi' scheme, accompanied by exotic financial vocabulary"), rev'd on other grounds, 519 U.S. 465 (1997).[3] In any event, as the court of appeals held (Pet. App. 9a-10a), it was within the district court's discretion to reach that conclusion. Compare *Pierce*, 487 U.S. at 569-571 (sustaining district court's exercise of discretion on question of substantial justification, despite existence of

---

[3] There is no force to petitioners' argument (Pet. 5, 15-17) that the CFTC's action against them involved some sort of improper "jurisdictional gambit." Pet. 5, 17; see Pet. 15-17. To the contrary, the district court specifically found (Pet. App. 10a) that the Commission's suit against petitioners had a reasonable basis both in law and in fact.

cogent contrary arguments). Nothing in that determination warrants further review by this Court.

3. The applicability of an abuse-of-discretion standard also sufficiently answers petitioners' argument (Pet. 12-13) that the decision below conflicts with *Marcus* v. *Shalala*, 17 F.3d 1033 (7th Cir. 1994).[4] Although *Marcus* sustained a district court's EAJA award, it held only that "a reasonable person could agree with the district court." *Id.* at 1038. The court specifically rejected any invitation "to review the district court's decision by engaging in [its] own comprehensive analysis" of the substantial-justification issue, noting that "particularized appellate scrutiny * * * is to be avoided in reviewing a lower court's decision for abuse of discretion." *Ibid.* Indeed, the conclusion to *Marcus*'s discussion of the issue may be applied just as easily to this case: "Since the district court relied on the appropriate standard and its decision has a basis in reason, we cannot conclude that it abused its discretion." *Ibid.*

---

[4] The court of appeals properly rejected (Pet. App. 4a) petitioners' claim (Pet. 13-15) that the court's decision in this case conflicts with its own previous decision in *FEC* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), cert. denied, 510 U.S. 1116 (1994). Any such conflict would, in any event, be a matter for resolution by the Second Circuit, rather than by this Court. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

DAVID R. MERRILL
*Acting General Counsel*
J. DOUGLAS RICHARDS
*Deputy General Counsel*
C. MARIA D. GODEL
*Attorney*
*Commodity Futures*
*Trading Commission*

AUGUST 1999

(3)

No. 98-2055

Supreme Court, U.S.
FILED
SEP 2 1999
CLERK

IN THE

# Supreme Court of the United States

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

*Petitioners,*

—v.—

COMMODITY FUTURES TRADING COMMISSION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONERS' REPLY BRIEF

GARY D. STUMPP
*Counsel of Record*
ADAM M. BOND
STUMPP & BOND, LLP
45 Broadway, Suite 2106
New York, New York 10006
(212) 968-8600

14 pp

## TABLE OF CONTENTS


| | | PAGE |
|---|---|---|
| TABLE OF AUTHORITIES | | ii |
| I. | The Decision Below Improperly Creates EAJA Immunity | 1 |
| II. | The Decision Below Was An Abuse of Discretion | 2 |
| | A. It Directly Conflicts With *Pierce* | 4 |
| | B. It Ignored the Underlying Decision of the Court Before Remand | 8 |
| | C. It Directly Conflicts With the Seventh Circuit | 9 |
| CONCLUSION | | 10 |

## TABLE OF AUTHORITIES

**Cases** PAGE

*Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) ..... 3

*Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) .....2, 4-6, 9

*Commodity Futures Trading Comm'n v. Sterling Capital Co.*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169 (N.D. Ga. Feb. 20, 1981), *modified on other grounds*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981) ..... 3

*Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997).....2, 4, 8

*Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994)..... 10

*Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996) ..... 10

*Pierce v. Underwood*, 487 U.S. 552 (1988).....1, 4, 5, 8

*Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994).....3, 9

*Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994) ..... 6

PAGE

**Statutes and Miscellaneous**

7 U.S.C. § 2(i) ..... 2

7 U.S.C. § 2(ii) ..... 2, 8

7 U.S.C. § 6c(b) ..... 2

*Futures Industry*, March 1997 ..... 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

**No. 98-2055**

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

*Petitioners*,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONERS' REPLY BRIEF

### I. The Decision Below Improperly Creates EAJA Immunity

Although the Solicitor General proffers three meritless bases to deny certiorari, it studiously avoids the most compelling reason for granting review: the decision below creates EAJA immunity for the government whenever it can find *one case* to support its position, notwithstanding that its purported rationale is wholly defective, "quite unnatural," or in conflict with decisions of other courts. Such a determination not only contradicts the Court's prior holding in *Pierce v. Underwood*, 487 U.S. 552 (1988) ("*Pierce*") and ignores the Court's unanimous decision in the underlying matter, it also improperly constricts the EAJA, and places potential litigants

in the precise position the EAJA was specifically enacted to avoid (i.e., challenging unjustified government action at their own cost).

Additionally, after the Court's unanimous decision that the CFTC's jurisdictional claims were completely unfounded, the CFTC, the district court, the court of appeals, and the Solicitor General, each have sought to denigrate the rationale of this Court—the only one to address the lack of merits to the CFTC's claims—in an attempt to improperly re-write the EAJA. Indeed, unless the Court grants certiorari, not only will EAJA immunity be conferred where there is a single case in the government's favor, but "substantially justified" will have been improperly redefined.

The Solicitor General attempts to render meaningless this Court's unanimous decision (which should have bound the lower courts reviewing Petitioners' EAJA application) that the CFTC's jurisdictional arguments were not only "quite unnatural," but also "wholly unpersuasive," "unsupported by statutory language," and "in clear contravention of Congress' intent"—and the contrary conclusion (espoused by Petitioners from the outset) was "plain" from the clear statutory language. (App. 18a-19a, 22a) Instead, the decisions below improperly violate both the purpose and the statutory language of the EAJA, by actually deterring challenges to such unwarranted governmental action.

## II. The Decision Below Was An Abuse of Discretion

The Solicitor General contends that in filing the underlying action, the CFTC relied on: (1) two sections of the CEA providing for options jurisdiction (7 U.S.C. §§ 2(i) and 6c(b))—although it failed to consider the Treasury Amendment's express exclusion of jurisdiction over the off-exchange foreign currency options involved here (7 U.S.C. § 2(ii)); and (2) the Second Circuit's decision in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) ("*American Board of Trade*") (which it stated had held that an option on foreign currency "did not become a 'trans-

action[ ] in' that currency, within the meaning of the [Treasury] Amendment, unless and until the option was exercised")—a rationale which the Court unanimously held to be "quite unnatural." (Opp. Br. at 2-3)[1] Thus, it offers three erroneous bases to deny certiorari, namely that the decision below allegedly: (1) did not conflict with this Court's holding in *Pierce*; (2) did not ignore this Court's decision on the merits of the underlying case; and (3) did not conflict with the decision of the Seventh Circuit in *Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994) ("*Marcus*"). (*Id.* at 7-10) The CFTC is simply wrong.

As described herein, since the Court already has held that the CFTC had no jurisdiction over Petitioners (due to the "plain meaning" of the Treasury Amendment), the decisions below abused their discretion in concluding—without even mentioning the Court's unanimous (and rather critical) rejection of all of the CFTC's contentions—that it had met its burden to prove that its position was "substantially justified."

---

[1] It also states that it cited *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137, 1154 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) (involving options on Government National Mortgage Association securities), and *Commodity Futures Trading Comm'n v. Sterling Capital Co.*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,169, at 24,784 (N.D. Ga. Feb. 20, 1981), *modified on other grounds*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,170 (N.D. Ga. Apr. 13, 1981) (involving foreign currency options)—both of which stated that the underlying option did not become a "transaction in" that commodity until it was exercised. (Opp. Br. at 3) However, *Board of Trade* held only that organized *exchange* trading in GNMA options was within CFTC rather than SEC jurisdiction; it expressly drew "no conclusion as to whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency." (677 F.2d at 1154, n.34) Additionally, the "not until exercised" rationale utilized in both cases was unanimously held by the Court in its underlying decision to be "quite unnatural."

### A. It Directly Conflicts With *Pierce*

In erroneously contending that the decision below does not conflict with *Pierce*, the CFTC correctly acknowledges that the Court there defined EAJA's "substantially justified" standard as having a "reasonable basis both in law and fact," and that appellate review of an EAJA determination is under an "abuse of discretion" standard. (Opp. Br. at 6) However, the CFTC improperly attempts to denigrate the Court's additional statement that "the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified," and erroneously contends that Petitioners have "ignore[d] both the context in which the Court made it and the circumstances of the present case." (Opp. Br. at 6-7) However, it is the Solicitor General which "ignores" both the relevant context and circumstances, and essentially seeks to create EAJA immunity when the government can find one case in its favor.[2]

Indeed, the Solicitor General cannot avoid the fact that the Second Circuit ignored this Court's articulated rationale in *Pierce*, and parochially relied *solely* on its own prior decision in *American Board of Trade*—even though (and without even acknowledging that) its specific rationale was held by the Court to have been "quite unnatural." (App. 18a) Moreover, the CFTC does not even attempt to respond to Petitioners' observation that the decision below renders *Pierce*'s admonition meaningless, and gives the government no incentive to carefully consider its litigating position (*see* Pet. at 7):

---

[2] The CFTC also improperly seeks to limit *Pierce* by contending that it "only" held that on the record in that case, it could not be concluded "that the District Court abused its discretion in finding no 'substantial justification' for the government's position." (Opp. Br. at 7) However, in erroneously holding that the district court did not abuse its discretion in finding that the CFTC met its burden, the court below itself abused its discretion by solely relying on one case (App. 3a-4a), and by ignoring the fact that the Court had unanimously rejected that decision's rationale as "quite unnatural."

> [T]he court's holding permits the government to convert a position which was not substantially justified (although the government still won), into a position which is deemed to be substantially justified in later cases. In other words, notwithstanding the Court's acknowledgment in *Pierce* that "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569), that same position would necessarily be characterized as substantially justified under EAJA as to any later litigant.

Furthermore, the Solicitor General attempts to rely on the erroneous conclusion below "that the CFTC's jurisdictional position was substantially justified" (Opp. Br. at 7). However, it inaccurately claims that the decision below relied "primarily" (*id.*) or "principally" (*id.* at 6)—rather than *solely*—on the Second Circuit's decision in *American Board of Trade*, despite the court's specific description of that defendant as "an organization that provided, *inter alia*, an exchange or marketplace for certain commodity options transactions" (803 F.2d at 1244), thereby rendering the Treasury Amendment exemption inapplicable (as it is qualified "unless such transactions involve the sale thereof for future delivery conducted on a board of trade"). Thus, rather than constituting "a reasoned decision by a unanimous panel" (Opp. Br. at 7),[3] the analysis in *American Board of Trade* was obviously flawed. Such a fact should have been evident to the CFTC (had it performed any such analysis prior to bringing the

---

[3] Moreover, the Solicitor General suggests an improper differentiation among the circuits, based on the purported expertise of the court involved. Thus, by claiming that the CFTC's alleged reliance was "substantially justified" because the Second Circuit was "a court with considerable expertise in matters relating to commercial and financial regulation" (*id.*), it improperly postulates some arbitrary ranking of circuits based on their perceived experience in the relevant subject matter. In any event, no such claims can make the decision in *American Board of Trade* any less incorrect, nor do they in any way alter the "plain language" of the Treasury Amendment.

underlying action)—particularly in light of the fact that at that time, it was already 10 years old, and its reasoning had been seriously undermined by the Fourth Circuit in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970-79 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994) (which conducted an extensive analysis of the language and meaning of the Treasury Amendment, and rejected the CFTC's position). Similarly, it failed to even consider *any* of the other decisions rendered concerning the appropriate scope of the Treasury Amendment (*see* Pet. at 8, n. 4)—where only the Second Circuit in *American Board of Trade* had held (erroneously) that the CFTC had jurisdiction over *off*-exchange options.

The Solicitor General also purports to rely on the district court's erroneous determination, relying on Second Circuit dicta (58 F.3d at 52-53), that the CFTC's position allegedly had a "reasonable basis in fact," since both decisions below inaccurately stated that there was "no suggestion that the CFTC failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." (Opp. Br. at 7, n.1; *see also id.* at 5) However, as most recently noted in Petitioners' Circuit Reply (at 9-12, footnotes omitted), the CFTC actually failed to prove any substantially justified factual basis—and instead relied solely on its allegations, many of which were demonstrably false:

> The CFTC Brief extensively describes, as if they were established facts, its naked *allegations*—even though, more than four years after they were first raised, they remain no more than that. . . . . Moreover, even though its own appointed receiver failed to sustain many of its unfounded contentions, the CFTC continues its mantra-like recitation of its purported "facts." Additionally, it contends that [the Second Circuit] "found more than sufficient factual predicate for the relief requested by the Commission"—even though [the Second Circuit] actually had only noted that "[o]n the present record" (i.e.,

> the CFTC's "evidentiary proffer," without any evidentiary hearing or actual *proof* by the CFTC), "it would *appear* that" certain improprieties may have occurred, a far different statement than that ascribed to it by the CFTC. (58 F.3d at 52-53, emphasis added).

Finally, although the Solicitor General claims that "[t]here is no force to petitioners' argument" that the CFTC had engaged in a "jurisdictional gambit," its only stated response is that the district court (erroneously) found that the CFTC "had a reasonable basis both in law and in fact." (Opp. Br. at 9, n.3) Moreover, despite this unsubstantiated claim, the record indicates that the CFTC initiated these proceedings not to remedy any alleged fraud (as to which it has completely failed to adduce any evidence), but in a continuing jurisdictional gambit. Similarly, it does not deny that this was not the CFTC's first attempt to reinterpret the Treasury Amendment and assert jurisdiction to suit its own purposes, despite the clear statutory language; that such a jurisdictional gambit also was evidenced by the CFTC's venue shopping tactics in these proceedings; and that it struggled to avoid dismissal even after the unanimous decision of this Court, by attempting to resurrect an alleged issue it previously had abandoned.[4] (*See* Pet. at 15-18)

---

[4] The CFTC misleadingly describes its own activities after the Court's prior remand, by simply claiming that after such decision, "the court of appeals in turn remanded the case to the district court, with instructions to dismiss the complaint." (Opp. Br. at 4) However, as previously noted, despite the Court's unanimous decision, the CFTC's Chairperson contended that "[t]here are other issues that are still open in the case and the case will go forward" (*Futures Industry*, March 1997, at 28)—and on remand, the CFTC persisted in its unwarranted attempts to continue the underlying litigation, by purporting to resurrect previously abandoned contentions. Ultimately, the Second Circuit rejected the CFTC's improper attempt, and directed that the district court dismiss the complaint.

### B. It Ignored the Underlying Decision of the Court Before Remand

In erroneously contending that the decision below did not conflict with the Court's underlying decision in this case, the Solicitor General cites the Court's observation in *Pierce* that "a position can be justified even though it is not correct" and that an EAJA determination is based on "not what the law now is, but what the Government was substantially justified in believing it to have been." (Opp. Br. at 8) However, the "law" at issue here—the Treasury Amendment to the CEA, 7 U.S.C. § 2(ii)—has *not* changed; its "plain language" is the same as when it was first enacted in 1975. Thus, in attempting to usurp jurisdiction which was clearly exempted by the provision, the CFTC was not "substantially justified in believing it to have been" any different than its "plain language." (*See also* Petitioners Reply Brief to this Court in the underlying action at 18-19, noting that since its creation in 1975, the CFTC has proffered at least three inconsistent Treasury Amendment interpretations.)

Moreover, in claiming that the decisions below "understood and applied [the cited] standards in this case" (*id.* at 9), the Solicitor General asserts that those arguments "were not unreasonable" (*id.*), and the Court merely found them "unpersuasive" (*id.*) and "rejected the statutory construction (and controlling circuit precedent) on which the Commission relied" (*id.* at (I)).[6] In this fashion, the CFTC (apparently deliberately) continues to attempt to denigrate this Court's underlying decision, as well as its stated reasoning, by effectively contending that its position was "substantially justified" even where this Court unanimously held that it was not only "quite unnatural," but also "wholly unpersuasive,"

---

[6] It is significant to note that the only support proffered for such a contention were various examples purporting to demonstrate "the important public purposes that the Commission sought to further by pursuing remedies for the [allegedly] fraudulent conduct in which petitioners had engaged." (Opp. Br. at 9) Again, the CFTC's somehow substitutes its naked allegations for proof.

"unsupported by statutory language," and "in clear contravention of Congress' intent." Thus, the Solicitor General advocates some talismanic EAJA immunity due to a single prior decision, the underlying rationale of which was wholly rejected by the Court.

The decision below improperly ignored the unanimous opinion of the Court—the only court to even address the merits of Petitioners' contentions—and parochially relied solely on its own ten year old decision, the underlying rationale of which was wholly rejected by the Court. As previously noted, particularly where the "reasoning" of *American Board of Trade* clearly represented a misreading of the plain meaning of the Treasury Amendment, and the CFTC exploited it for a "free ride" through the Second Circuit—both on the merits of the underlying action, as well as on the subsequent EAJA application—Petitioners properly should not be compelled to bear the cost of its unwarranted jurisdictional gambit.

### C. It Directly Conflicts With The Seventh Circuit

In erroneously contending that the decision below did not conflict with the decision of the Seventh Circuit in *Marcus*, the Solicitor General simply seeks to rely on its application of an "abuse of discretion" standard of review, and tautologically concludes that "[s]ince the district court relied on the appropriate standard and its decision has a basis in reason, we cannot conclude that it abused its discretion." (Opp. Br. at 10, citing 17 F.3d at 1038) Thus, it is apparently of no moment to the Solicitor General that *Marcus* actually affirmed an EAJA award, or that the current conflict stemming from the decision below creates substantial uncertainty concerning the scope and meaning of the EAJA.

Moreover, aside from any such conflict with the Seventh Circuit, the Solicitor General never explains how something more than a unanimous decision of the Court before remand, as well as prior EAJA precedent of the Court (and governing

authority of the Second Circuit)[7] should have been necessary below. Similarly, the Solicitor General failed to explain how the CFTC can claim to have relied on outdated Second Circuit precedent in the underlying action, but after those contentions are held to be "quite unnatural" by a unanimous Court, it then can claim that it is somehow (conveniently) *not* bound by that decision and the Second Circuit's own EAJA authority. Instead, as the Second Circuit held in *Political Contributions*, it should have reversed the denial of EAJA fees "not because the government lost its claim, but because a previous panel of this court [or here, this Court] determined that the statutory language and the legislative history were clear." (*Id.* at 387)

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY D. STUMPP
*Counsel of Record*
ADAM M. BOND
STUMPP & BOND, LLP

September, 1999

---

[7] As to the internal conflict between the decision below and the Second Circuit's prior opinion in *Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994), the CFTC simply asserts that the decision below "properly rejected" such a claim—without proffering any rationale therefor, and further contended that "[a]ny such conflict would, in any event, be a matter for resolution by the Second Circuit, rather than by this Court." (Opp. Br. at 10, n. 4) However, it neglects to even address that the Circuit itself not only failed to resolve such conflict, but actually created the conflict by its contradictory rulings. *But see, e.g., Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (prior Circuit precedent is binding, and can only be overruled by in banc review or a decision of the Supreme Court).